Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-1815

DR. LEON SALOB,

Petitioner,

against

GORDON M. AMBACH, Commissioner of Education of the State of New York, NEW YORK STATE EDUCATION DEPARTMENT and THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

Petition for Writ of Certiorari to the United States Supreme Court from the Court of Appeals of the State of New York.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Court of Appeals of the State of New York.

Opinion Below.

Dr. Leon Salob, the petitioner, appeals from the final judgment of the Court of Appeals of the State of New York, in which the judgment of the Court of Appeals of the State of New York affirms the suspension of the petitioner from the practice of chiropractor for nine (9) months and placed him on probation for five (5) years. Said decision was rendered on February 20, 1980 and the opinion of the Court of Appeals of the State of New York is reported at 49 N. Y. 2d 702, 703.

The finding of fact and recommendations of the hearing board for the New York State Education Department is in the appendix.

A notice of appeal was filed on May 1, 1980, in the civil proceeding at the Court of Appeals of the State of New York, and the Appellate Division, Third Department (possessor of the record).

This appeal is being docketed in this Court within 90 days from the denial of the judgment.

The Court of Appeals decision on February 20, 1980 is as follows:

> "No. 158: In the matter of Leon Salob, appellant, Gordon Amach, Commissioner of Education of the State of New York, New York State Education Department and the Board of Regents, respondents.
>
> "On the Court's own motion, appeal taken as of right dismissed without costs upon that no substantial constitutional question is directly involved.
>
> "Motion for leave to appeal denied with twenty dollars, costs and necessary reproduction disbursements."

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3) and Article Three of the U.S. Constitution. Petitioner asserts that his conviction before a non-judicial Hearing Board prohibiting the rules of evidence, prohibiting his rights under the U.S. Constitution to be heard in particular with respect to the Fourth and Fifth Amendments, materials seized from his home/office and a written motion seeking suppression of same timely made and specifications based upon a single hearsay complaint, not from his patients, can strip a doctor of his license.

Questions Presented.

Can a State enforce a judgment against a doctor/chiropractor at his home/office where an investigator posing as a patient and whose sole purpose was to secure evidence enters said office without a warrant, administrative or search warrant, and on three (3) occasions, seize publications, letterheads and other materials in the home/office of said doctor, and an X-ray allegedly obtained by the investigator-patient where a written motion to suppress was made at the Board hearing and argued pursuant to the Fourth and Fifth Amendments of the United States Constitution and *Marshall v. Barlow*, 98 S. Ct. 1816, But the manual that the five-man chiropractor board, non-lawyers Slavinshy adhered to does not permit motions addressed to the U. S. Constitution or any other motions to be heard or ruled upon with respect to professional men and women being brought up on non-criminal charges, and does such manual take precedence over all our laws?

Can a State obtain a judgment on two specifications against a doctor at a board hearing *without the rules of evidence* and pursuant to Section 6510 (2B) of the New York State Education Act. "The Panel shall not be bound by the rules of evidence but its determination shall be based on *substantial legal evidence.*" How then can it be answered "Evidence is the medium of proof; proof is the effect of evidence?"

Can alleged evidence to support the judgment be both legal and substantial if the alleged evidence was obtained and introduced at the hearing without the rules of evidence, without adherence to the U. S. Constitution, and not competent, relevant, and material, and further at a crucial part of the hearing, denial of cross-examination? Is not the phrase legal and substantial evidence under 6510 (2B) of the Education Law contradictory as to both elements and to each other. Is 6502 (b) of the Education Law constitutional?

Does it give due process or equal protection of the laws to all professional men, doctors, pharmacists, chiropractors, *et. al.* Is

it not designed to give full force to a bias verdict. Should not professional men be given equal rights to the U. S. Constitution as are *aliens* in criminal cases.

Does it afford due process and equal protection of the law?

Can a civil judgment be sustained against a doctor where a single letter based on a hearsay complaint from a lawyer of the Chiropractor Association by a non-patient which initiated the two specifications and where the bias of the panel coupled with having one voting member as PHD is ruled as a judgment or verdict of the Peers of said doctor, and where not one patient testified against the petitioner but only one witness—a State investigator?

Can the petitioner like all professional persons in this nation be deprived of the same type of hearing and trial as afforded in courts of record including family court, small claim court and local police and municipal court with respect to rules of evidence, U. S. Constitution and jury trial, when his license and livelihood is at stake and the well being of his family?

Should professional men and women of this nation and in particular New York State, in civil proceeding involving the loss of their license, suspension or other punishment be subjected to other standards of proof at a Board Hearing, less than reasonable doubt, preponderance of the evidence, clear and convincing evidence and if such proof is to be offered how can it be offered without the rules of evidence and without the framework of the State and U. S. Constitution applying?

What is the standard of proof that a prosecutor must sustain? It is not defined, but only in meaningless words substantial legal proof? If the Fourth and Fifth Amendments apply to warranted searches then there is no proof in the case at bar or if the rules of evidence apply then the proof is nebulous and not legal in the case at bar. In civil proceedings where evidence upon which punishment is based is objected to on constitutional issues isn't it applicable to administrative proceedings.

Does not a Hearing Board usurp its own function of impartiality and is bias when after they individually examine an X-ray, examine the investigator's dental work, although not dentists, and when they individually and unanimously agree that the sole X-ray furnished identification of the investigation and rejected testimony totally of a doctor, expert in radiology for 40 years? Does this not place them in a position where they are judge, jury and advocate of their own position and render their verdict bias? Is it not true that a Judge, Referee or arbitrator may not testify as witnesses in any trial or proceeding over which he presides as stated in *People v. Dohring*, 59 N. Y. 374?

Statutes Involved.

6510(2B) conduct of hearing. The evidence in support of the charges shall be presented by the Attorney General or his designee. The licensee shall have the rights required to be stated in the notice of hearing (subparagraph d of subdivision one of this section). *The panel shall not be bound by the rules of evidence* but its determination of guilt shall be based on substantial legal evidence.

See appendix for full rule, but nowhere is it stated that motions on Constitutional rights can be made.

That the statute of the Education Law relating to acupuncture is overbroad and vague in that mere conversations about acupuncture are sufficient to be found guilty.

That the statute relating to advertisement has been declared unconstitutional by *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer's Council, Inc.*, 425 U. S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346l, and is infringement of the constitutional rights of the doctor under the First Amendment to the U. S. Constitution.

Statement of the Case.

The petitioner, Doctor Leon Salob, was admitted to the Practice of Chiropractor in 1970 for the years 1974 to 1979. He resided in the Town of Commack, Long Island, New York with his wife, a registered nurse and his two young children. He has an office in his home. He has been a leader for advanced chiropractor methods, and has recently made significant progress towards the rehabilitation of paraplegics.

By complaint dated August 14, 1978 proceedings were commenced by petition charging petitioner with practicing the profession of chiropractic beyond its authorized scope (first specification) and with unprofessional conduct (second specification).

The first specification charged a violation of section 6509 subd. 2 of the Education Law of the State of New York in that on May 18, 1978 the petitioner herein was alleged to have X-rayed one Mark Russo at this chiropractic office located at 386 Town Line Road, Commack, New York, without a licence to do so, and further in violation of section 6556 (sub. I) of the Education Law of the State of New York. This specification seems to be the main thrust of the case.

The rules of evidence did not apply pursuant to 6502(b) of the Education Law of the State of New York (the no rules of evidence), and this is what happened:

That the X-ray had no date, no doctor's name, no address, nor identified by the investigator except upon information and belief and was not under lock and key but loosely thrown into a locker, not logged, not sealed and accessible to all other investigators, wrapped only in a newspaper. There was no way of knowing whose X-ray it was, where it was made and when. That the X-ray according to the 5 member Board each affirming its admissibility said that after each member of the Board examining the mouth of the investigator that identification was by dental work.

That the X-ray was admitted because of the "no rules of evidence" into evidence on the basis that the X-ray showed the dental work of the investigator and the body of the investigator. The rules of evidence would have demanded continuity of possession, no alteration and no tampering, and in the same condition as the picture was when allegedly taken. No expert testimony was offered by the prosecution to interpret the X-ray nor was it authenticated.

The defense offered Dr. Sheldon, expert, in radiology, his speciality, medical doctor and diplomate of the Amercian Board of Radiology, having performed over ½ to 1 million X-rays in 40 years; working for State Insurance Fund, testified that it was impossible to identify the dental work as belonging to this investigator nor was it a photograph of the investigator's dental work it was offered to prove.

That there was nothing in this X-ray which could be characteristic or specific to one person as to dental work. Dr. Sheldon further stated there had to be two X-rays, to compare in order to render judgment and there was no comparison here to make this determination and even if there were two X-rays to compare both would have to be taken from the same angle, with the same lighting effects. The Hearing Board rejected Dr. Sheldon's testimony in full although uncontradicted by their own cross-examination. The Hearing Board on this crucial evidence sat in triple capacity as judges, jury and advocate. They voted they were right—some impartiality—some hearing.

In the second specification it was charged that Dr. Salob performed acupuncture on the investigator although no acupuncture was performed as no needles were inserted in the body of the investigator and no pressure was used. Pamphlets in the office of Doctor Salob as to acupuncture and a sign seem to be the only indicia of acupuncture.

That there may have been discussions about acupuncture but no questions were asked about treatment and whether Doctor Salob had associates licensed in acupunture which he had. Dr. Salob told him that acupuncture was unnecessary in his case.

The question of advertisement by chiropractor forms part of the second specification although the yellow book in New York City and the newspapers in English and foreign language are filled with advertisements by chiropractors and Doctor Salob advertisement was by a card "Have Hands; Will Travel."

Further that although a private practictioner he and his wife, a registered nurse who worked with him held his business out as a center for chiropractor.

The investigator admitted changing his testimony several times, that no patients of Dr. Salob had been contacted and further the small bill on the letterhead of Doctor Salob contained no mention of X-ray, acupuncture and no signature of the doctor. Said bill was allegedly made out in the presence of the investigator. That the investigator was permitted to read into the record the contents of his alleged reports over objection to rehabilitate him and to destroy the cross-examination.

Reasons for Granting the Writ.

1. Every professional person in the State of New York and in many other states is in grave danger to be subjected to changes and specifications on hearsay complaint submitted by a lawyer for the professional association which he represents and a State investigation without a warrant either administrative or a search warrant can invade the office or place of business, seize publications, get into evidence against said professional any statements made or conversations had and as sole witness testify without corroboration, a professional right to invoke the guarantees of the U. S. Constitution without the rules of evidence and rights to a motion to suppress under the Fourth and Fifth Amendments to the United States Constitution at a Hearing and have his license revoked or suspended and harsh penalties imposed are swept aside. The Hearing Board adhered to a manual which states that no motions can be entertained. Does this not give to every Hearing Board arbitrary and capricious powers to ignore the U. S. Constitution, their own State Constitution and afford to the accused no equal protection of the laws. And to disregard

the Civil Rights Law Section 8 of New York State which is virtually a verbatim repetition of the first paragraph of Article 1 Section 12 of the New York State Constitution and of the Fourth Amendment to the U. S. Constitution.

The Fourth Amendment applies to acts of Government, its subdivision and its agents and the Civil Rights Law of the State of New York has been held to apply to officials as well as to private trespass. In *Finn's Liquor Shop v. State Liquor Authority,* 24 N. Y. 2d 647, although an SLA inspector from the State of New York obtained permission from the manager of a liquor store to inspect it, and although slips were found in a coat hanging in a near room of the store, indicating a sale of liquor on credit, the Court held the warrantless search unlawful and that "no state may require, as a condition of doing business, a blanket submission to warrantless searches at any time and for any purposes." 24 N. Y. S. at 658. Such a blanket authority would be unconstitutional. Further held that all state agencies are obligated to conduct their activities in conformity with the demands of the Constitution. When its agents exceed those limits it should not be permitted to avail itself of the fruits of such unlawful activity in order to impose sanctions upon the persons whose Constitutional rights have been violated. Cases containing similar facts and holdings. *Colonmade Catering Corp. v. U. S.,* 410 F. 2d 197; *People v. Horman,* 22 N. Y. 2d 378, that exclusionary rule applies to administrative proceedings:

With respect to administrative inspections without warrants are per se rendered invalid. *Camara v. Municipal Court,* 387 U. S. 523; *See v. City of Seattle,* 387 U. S. 541.

This matter of warrantless searches of professional persons' office and hearings held without the U. S. Constitution applicable and rules of evidence of each state being applicable to administrative proceedings should be settled by the Supreme Court and will remain in dispute until these constitutional rights are clearly set forth. And mandated by the Fourteenth Amendment to each state of the union. Clearly *Warden v. Hayden,* 387

U. S. 294, does state that the mere evidence rule must satisfy probable cause and in particular respect to the Fourth Amendment (a warrant). *Hayden v. Warden,* 387 U. S. 294.

2. Clearly the question presented is important to every professional person in our country for at every hearing where a professional man's license is in jeopardy and as the professions become crowded any professional may be targeted for extinction for political beliefs, for religious belief or for any reason that does not comport with established modes of thinking. To be told that the manual must be upheld by the five man Board which manual permits no hearings on Constitutional issues and no Rules of Evidence is foreign to American Jurisprudence and our Bill of Rights.

The challenge to the Constitutionality by the petitioner in the courts below of Section 6510 of the Education Law of the State of New York (hearings) and in particular to Section 2 no rules of evidence (Appendix, page 15) in administrative proceeding is violative of the Sixth and Fourteenth Amendments of the U. S. Constitution as well as of the Fourth and Fifth Amendments of the U. S. Constitution. The fact that no former Judge or a lawyer presides or is a member of a Hearing Board which possess on admissibility of evidence where there are no rules of evidence and then ignores the U. S. Constitution and its state leaves open a verdict based on incompetent, irrelevant, immaterial and hearsay evidence. Is not illegal evidence thus admissible as well as uncorroborated and unconstitutional evidence. How then can the evidence be legal and substantial. Is this phrase substantial legal evidence, contradictory and only a phrase? To permit an investigator to read his alleged notes into evidence, his reports, is a runaway, chaotic hearing.

3. *Aliens* are constitutionally protected and can invoke the Fourth Amendment, even by American Law Enforcement activities aboard and that *non-resident* aliens are equally protected and entitled *to* our Constitutional rights, and may invoke the Bill of Rights. *Toscanino v. U. S.,* 500 F. 2d 267. Why then are professional men and women not protected by the Fourth and Fifth Amendments when an investigative agent of the state

enters his office for the sole purpose of securing evidence and investigative or representatives of state government are prohibited from violating the Fourth and Fifth Amendments without a proper warrant and cannot avail themselves of or profit by such unlawful activity. *Finn Liquor Shop v. State Liquor Authority, supra,* and *Leogrande v. U. S. L. A.*, 25 A. D. 2d 225, do apply to administrative proceedings.

Where the materials "are books" and the basis for their seizure is the ideas which they contain, the most "scrupulous exactitude" is demanded in the warranty's description.

Stamford v. Texas, 379 U. S. 476, 485. See, also, *Marcus v. Search Warrant,* 367 U. S. 717. In the case at bar no warrant was applied for or used to seize pamphlets in the doctor's office.

Any alien or nonresident alien when charged with a crime has a higher status than an American doctor, chiropractor, pharmacists, dentists when brought before a Hearing Board and charges leading to the loss of his license are heard who cannot invoke the exclusionary rules nor the Fifth Amendment or all his Constitutional rights or the Bill of Rights or his civil rights. *The professional is barred in his Own country from such challenges to the evidence adduced at the Hearing, in the civil hearing but the resident alien or non-alien at his jury trial can assert the rules of evidence as well.*

The alien may even sue the U. S. Government for acts of its agents and apparently the non-resident alien may do so but not the professional person in a hearing, a charade.

4. It is further stated that the Hearing Board was prejudiced by part of a specification and part of evidence dealing with alleged X-rays taken by the doctor three years previous in which a letter was sent to him warning him but no specification was had at that time. This had no place in the hearing but was included in the present specification over the objections of counsel was permitted.

The Court of Appeals the ultimate voice of New York Law found itself impotent to give relief on appellant's claims. In view of the fact the Board of Regents adopted this "tainted determination" since the decision below may rest on a constitutionally inadmissible ground the judgment should not stand. *Stromberg v. California,* 283 U. S. 359.

A Judge, referee or arbitrator may not testify as witnesses in any trial or proceeding over which he presides. *People v. Dohring,* 59 N. Y. 374; *Morss v. Morss,* 11 Barb. (N. Y.) 510; Richardson, Section 422—8th Edition. In the case at bar the Hearing Panel in effect did exactly this, then refused to overrule themselves after hearing Doctor Sheldon.

CONCLUSION.

For the foregoing reasons the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES J. HANRAHAN,
Counsel for Petitioner.

Court of Appeals, State of New York, Decision on February 20, 1980.

Mo. No. 158

IN THE MATTER

of

LEON SALOB,

Appellant,

vs.

GORDON AMBACH, as Commissioner of Education of the State of New York, *et al.*,

Respondents.

On the Court's own motion, appeal taken as of right dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

Motion for leave to appeal denied twenty dollars costs and necessary reproduction disbursements.

Section 6510 of the Education Law of the State of New York.

§6510. Proceedings in cases of professional misconduct

In cases of professional misconduct the proceedings shall consist of (1) prehearing procedures by the education department, (2) hearing procedures by the committee on professional conduct for the particular profession, (3) decision procedures by the board of regents, and (4) review procedures by the appellate division of the third judicial department, as follows:

1. Prehearing procedures.

a. Complaint. A complaint of a licensee's professional misconduct may be made by any person to the education department.

b. Investigation. The department shall investigate each complaint and if the department and the committee on professional conduct for the particular profession decide that a hearing is warranted, the department shall request the attorney general to prepare the charges.

c. Charges. Upon such request the attorney general shall prepare the charges if he decides that a hearing is warranted. The charges shall state the alleged professional misconduct and shall state concisely the material facts but not the evidence by which the charges are to be proved.

d. Notice of hearing. The department shall set the time and place of the hearing and shall prepare the notice of hearing. The notice of hearing shall state (1) the time and place of the hearing, (2) that the licensee may file a written answer to the charges prior to the hearing, (3) that the licensee shall appear personally at the hearing and may be represented by counsel, (4) that the licensee shall have the right to produce witnesses and evidence in his behalf, to cross-examine witnesses and examine evidence produced against him, and to have subpoenas issued in his

behalf to require the production of witnesses and evidence in manner and form as prescribed by the civil practice law and rules, (5) that a stenographic record of the hearing will be made, and (6) such other information as may be considered appropriate by the department.

e. Service of charges and of notice of hearing. A copy of the charges and the notice of hearing shall be served on the licensee personally by the department at least fifteen days before the hearing. If personal service cannot be made after due diligence and such fact is certified under oath, a copy of the charges and the notice of hearing shall be served by registered mail to the licensee's last known address by the department at least twenty days before the hearing.

2. Hearing procedures.

a. Hearing panel. The hearing shall be conducted by a panel of five or more members of the committee on professional conduct for the particular profession. The panel shall be appointed by the committee chairman who shall designate the panel chairman.

b. Conduct of hearing. The evidence in support of the charges shall be presented by the attorney general or his designee. The licensee shall have the rights required to be stated in the notice of hearing (subparagraph d of subdivision one of this section). *The panel shall not be bound by the rules of evidence, but its determination of guilt shall be based on substantial legal evidence.*

c. Results of hearing. As a result of the hearing the panel (1) shall make findings of fact, (2) shall make a determination of guilty or not guilty on each charge, and (3) in the event of a determination of guilty, shall make a recommendation of the penalty imposed. For the panel to make a determination of of guilty, a minimum of four-fifths of the panel must vote for such a determination.

d. Disposition of results. The panel shall transmit to the board of regents the transcript of the hearing and the results of the hearing and shall transmit to the licensee the results of the hearing unless the board shall have established a bylaw providing for a review of the record of findings and determination of the panel by the committee on professional misconduct. If such review is required, the committee shall review the record and transcript of the hearing and make a finding and recommendation by a four-fifths vote. The transcript and results of the hearing and the findings and recommendation of the committee shall then be transmitted to the board of regents. The licensee shall be advised of the results.

3. Regents decision proedures.

a. Regents review committee. The transcript and results of the hearing and the recommendation, if any, of the committee shall be reviewed at a meeting by a committee appointed by the board of regents. The committee shall consist of three members, at least one of whom shall be a regent.

b. Review committee meetings. The review shall be based on the transcript, results of the hearing and the recommendation, if any, of the committee, but the licensee may appear at the meeting, and the review committee may require him to appear. The licensee may be represented by counsel. The review committee shall notify the licensee at least seven days before the meeting (1) of the time and place of the meeting, (2) of his right to appear, (3) of his right to be represented by counsel, (4) whether or not he is required to appear, and (5) of such other information that may be considered appropriate. After the meeting the committee shall transmit a written report of its review to the board of regents.

c. Regents decision and order. The board of regents (1) shall consider the transcript, results of the hearing and the recommendation, if any, of the committee and the report of its review committee, (2) shall decide whether the licensee is guilty or not guilty on each charge, (3) shall decide what penalties, if any, to

impose as prescribed in section sixty-five hundred eleven of this article, and (4) shall issue an order to carry out its decisions. Such decisions shall require the affirmative vote of a majority of the members of the board. If the board disagrees with the hearing panel's determination of not guilty, it shall remand the matter to the panel for a new hearing after which the panel's determination of not guilty shall be final.

4. Court review procedures. The decisions of the board of regents may be reviewed pursuant to the proceedings under article seventy-eight of the civil practice law and rules. Such proceedings shall be returnable before the appellate division of the third judicial department, and such decisions shall not be stayed or enjoined except upon application to such appellate division after notice to the attorney general.

Added L. 1971, c. 987, §2; amended L. 1971, c.994, §§ 4-6.

Findings, Determination and Recommendation of Hearing Panel.

LEON J. SALOB, the respondent herein, was issued license No. 001674 by the New York State Education Department, authorizing him to engage in the practice of chiropractic in the State of New York as a licensed chiropractor.

Respondent is currently registered to practice chiropractic in the State of New York.

Respondent was charged in these proceedings with practicing the profession of chiropractic beyond its authorized scope, within the purview and meaning of §6509, subd. 2 of the Education Law of the State of New York, in that: on or about May 19, 1978, respondent while not authorized by the New York State Education Department to use X-rays, did in fact X-ray the petitioner, who was using the name Mark Russo, at his chiropractic office located at 386 Town Line Road, Commack, New York in violation of §6556, subd. 1 of the Education Law of the State of New York.

Respondent was further charged with unprofessional conduct within the purview and meaning of §6509, subd, 9 of the Education Law of the State of New York, in that: (a) Based on the alleged acts of professional misconduct as set forth above; (b) On or about March 4, 1975, respondent represented to the Education Department of the State of New York that he would not X-ray patients until he was licensed to use X-rays by said Education Department. Respondent willfully and knowingly misrepresented his use of X-rays to said Education Department, in that, on or about May 19, 1978 respondent did use X-ray equipment in his office to X-ray patient Mark Russo, the name used by the petitioner. And further, respondent has willfully failed to comply with substantial provisions of the Education Law of the State of New York in violation of the Rules of the Board of Regents, and Regulations of the Commissioner of Education, 8 NYCRR 29.1 (b) (1); (c) On or about and between May 2, 1978 and June 2, 1978, respondent offered to practice and held himself out as being able to practice acupuncture, to

the petitioner who was using the name Mark Russo, in violation of §6512 of the Education Law of the State of New York and in violation of the Rules of the Board of Regents and Regulations of the Commissioner of Education, 8 NYCRR 60.10; (d) On or about May 19, 1978, respondent, used X-ray equipment as more fully set forth in the First Specification, paragraph "Third" thereof, and further, from on or about and between May 2, 1978 and June 2, 1978, respondent offered and held himself out as being able to practice acupuncture, as more fully set forth in the Second Specification, paragraph "Fourth", Subd. c hereof, in violation of the Rules of the Board of Regents and Regulations of the Commissioner of Education, 8 NYCRR 29.1 (b) 9); (e) Repondent is guilty of violating the Rules of the Board of Regents and Regulations of the Commissioner of Education, 8 NYCRR 29.1 (b) (12) (i) (l) in that, respondent's professional business card contains the language "Have Hands—Will Travel, Wire 864-3931", said language being deceptive, misleading and sensational; (f) Respondent is guilty of violating the Rules of the Board of Regents and Regulations of the commissioner of Education, 8 NYCRR 29.1 (b) (12) (i) (l) in that, respondent's professional business card contains the language, "Commack Chiropractic Center," said language being deceptive and misleading; (g) Respondent is guilty of violating the Rules of the Board of Regents and Regulations of the Commissioner of Education, 8 NYCRR 29.2 (a) (4), in that, respondent's professional business card contains the name "Dr. L.J. Salob," without indicating the profession in which the licensee holds a doctorate; (h) Respondent is guilty of violating the Rules of the Board of Regents and Regulations of the Commissioner of Education, 8 NYCRR 29.2 (a) (5), in that, respondent claimed professional superiority or special professional abilities, attainments, methods or resources, to wit, being able and qualified or certified to practice acupuncture, when in fact, respondent has not been qualified or certified to practice acupuncture by the New York State Education Department (i) Respondent is guilty of violating §130 of the General Business Law of the State of New York in that, from a time unknown to the petitioner and based on information and belief continuing to the present, respondent has practiced the profession of chiropractic under the assumed name Commack Chiropractic Center located at 386 Town Line Road, Commack, New York, said location situated within Suffolk County, New York, without registering said assumed name with the Clerk of said county.

The hearing having come on to be heard before us pursuant to a Notice of Hearing, Petition and Charges on November 2, 1978, November 30, 1978, December 21, 1978 and January 11, 1979, and the respondent having appeared with counsel, and the parties having had the opportunity to examine and cross-examine witnesses and to examine the documentary evidence; and a stenographic record having been made of the hearing and proceedings herein a copy of which is submitted herewith; and the hearing panel further consisting of five members and one alternate, said alternate not voting or taking part in the rendering of the within Findings of Fact, Determination and Recommendation; and documentary evidence having been received on behalf of petitioner including: a Notice of Hearing, Petition and Charges, with attached affidavit of service; a certificate of licensure as a chiropractor; certificate of Search vs. Commack Chiropractic Center; letter dated March 4, 1975 to Zita Adler, Investigator; two photographs; a business card; a blank letter with imprinted letterhead; an X-ray film; two pamphlets entitled, "What is Acupuncture"; a receipt dated May 19, 1978 for $15.00; a pamphlet entitled, "Why you may need X-Ray"; a pamphlet entitled, "Arm and Shoulder Pain"; and documentary evidence having been received on behalf of respondent, including: a letter dated August 10, 1978 to Dr. Ernest G. Napolitano; a letter dated August 15, 1978 to Dr. L.J. Salob; a letter dated October 30, 1974 to Dr. Leon Salab (sic); a letter dated December 15, 1966 to Dear Doctor; an excerpt from the Herald Statesman, Yonkers, New York, Thursday, November 17, 1966; two pages from the New York Telephone Company "Yellow Pages"; a letter dated May 18, 1977 to Dr. Salob; a letter dated October 21, 1978 to Dr. Leon J. Salob; and unmarked exhibits having been received on behalf of the petitioner and respondent, including; a five page handwritten motion by James J. Hanrahan, Esq.; a motion to suppress with attached deposition of Leon J. Salob; a carbon copy of a letter, dated December 12, 1978 to James J. Hanrahan, Esq.

NOW, UPON DELIBERATION AND CONSIDERATION of the entire record herein, we submit our report, including Findings of Fact, Determination and Recommendation, as follows:

Findings of Fact

1. LEON J. SALOB, the respondent herein, was issued license No. 001674 by the New York State Education Department, authorizing him to engage in the practice of chiropractic in the State of New York as a licensed chiropractor, (Petitioner's Exhibit No. 1).

2. We find that the respondent's license to practice chiropractic in the State of New York does not carry with it the use of X-ray privileges, (Petitioner's Exhibit No. 2).

3. We find that the respondent is not licensed to practice medicine, (Petitioner's Exhibit No. 3); dentistry, (Petitioner's Exhibit No. 4); or acupuncture, (Petitioner's Exhibit No. 5); in the State of New York.

4. We find that by letter dated March 4, 1975, respondent stated to the New York State Education Department, "When the N.Y.S. X-ray law is amended whereby a full spine is legal to be X-rayed I will then make application to a re-examination of the X-ray test by the N.Y.S. Education Department, and upon passing it will purchase a recognized and approved X-ray unit, at this address, or at another address depending upon how long this amendment will take," (Petitioner's Exhibit No. 7).

5. We find that on May 2, 1978 New York State Education department investigator Michael Caruso, hereinafter called the investigator, took two photographs of the front of a home. Said photographs, showing signs stating Commack Chiropractic Office; Acupuncture; and Dr. L.J. Salob, Chiropractor. Further said photographs also reveal the number, to wit, Three Eighty Six, above the sign stating Acupuncture, (Petitioner's Exhibit No. 8).

6. After taking the photographs (Petitioner's Exhibit No. 8), the investigator went to a door which had a sign stating "Ring Bell, Walk In". The investigator rang the bell and entered. Upon the walls of the waiting room the investigator noted respondent's undergraduate degree, chiropractic degree, New

York State Education Department license to practice chiropractic, and two degrees relating to acupuncture. Said acupuncture degree, each issued in the name of the respondent, read "Certificate of Proficiency, Hsi Yu Tao," signed by Eric Tao, and "Acpuncture Society of America, Kansas City, Missouri, (Petitioner's Exhibit No. 16).

7. While waiting for respondent, the investigator removed a business card, (Petitioner's Exhibit No. 9), from a wall rack in respondent's waiting room. Said investigator also obtained a piece of blank stationery, with letterhead (Petitioner's Exhibit No. 10), and a pamphlet, (Petitioner's Exhibit No. 11). We find that Petitioner's Exhibits Nos. 10 and 11 were taken from a counter in the waiting room of respondent's office and we further find said exhibits were offered to the general public as part of respondent's practice.

8. We find that respondent's business card, (Petitioner's Exhibit No. 9), states, to wit, "Dr. L.J. Salob, Mary Ellen Salob, R.N., Commack Chiropractic Center, 386 Town Line Road, Commack, New York, Office Hours: By appointment Only, Mon., Wed., Fri.—10-8, Tues., Thurs., Sat.—10-2, Have Hands—Will Travel, Wire 864-3931."

9. We find that respondent's letterhead, (Petitioner's Exhibit No. 10) contains exactly the same information as his business card, except for the use of the word "Office" instead of the word "Center", in the phrase "Commack Chiropractic Office".

10. We find that, Petitioner's Exhibit No. 11 is a pamphlet entitled "What is Acupuncture?, Is it for Me."

11. We further find that on May 2, 1978 the investigator did meet with the respondent. Said investigator used an assumed name of Mark Russo and further, said investigator asked the respondent whether acupuncture could help alleviate pain and muscle spasm in his right arm. Respondent recommended that an X-ray be taken to see if acupuncture was needed. No treatment was rendered on that date. The investigator then left and was not billed by the respondent.

12. We further find that on May 19, 1978 the investigator again returned to the respondent's office, pursuant to a pre-arranged appointment. During the May 19th office visit respondent positioned the investigator in front of an X-ray device and took his X-ray, (Petitioner's Exhibit No. 12).

13. We find that the investigator paid respondent $15.00 for his office visit on May 19, 1978, for which respondent gave him a receipt, (Petitioner's Exhibit No. 13).

14. We find that respondent's receipt (Petitioner's Exhibit No. 13) contains the heading, to wit, "Commack Chiropractic Center, 386 Town Line Road, Commack, New York 11725".

15. We further find that respondent has not registered the name, to wit, Commack Chiropractic Center, with the Suffolk County Clerk, (Petitioner's Exhibit No. 6).

16. We find that on May 29, 1978, the investigator, with the approval of the respondent, took two pamphlets from the counter in the waiting room. Said pamphlets are entitled "Why You May Need X-Ray", (Petitioner's Exhibit No. 14) and "Arm and Shoulder Pain," (Petitioner's Exhibit No. 15). We further find that Petitioner's Exhibits Nos. 14 and 15 were obtained from the same counter, where, on May 2, 1978, the investigator had obtained Petitioner's Exhibits Nos. 10 and 11.

17. Thereafter, on June 2, 1978, the investigator returned to respondent's office. During the visit the respondent drew "plumb" lines on the X-ray he had taken on May 19, 1978 of the investigator. Respondent further noted a ¼ inch difference in height of the X-ray image of the investigator's shoulder structure, (Petitioner's Exhibit 12). Respondent further gave the X-ray, (Petitioner's Exhibit No. 12) to the investigator when the said investigator informed the respondent that he would be taking further treatments with another chiropractor.

18. We further find that respondent did not bill the investigator for the visit on June 2, 1978.

19. We find, after comparing the X-ray, (Petitioner's Exhibit No. 12) with Investigator Michael Caruso, that said X-ray is the X-ray of said investigator. We reject Dr. Edward E. Sheldon's opinion that a positive identification of an X-ray of a specific person cannot be made by making a comparison of the X-ray and a visual inspection of the person whose X-ray it purports to be.

20. We further note, that Dr. Sheldon testified that a visual examination of a person could rule out that person as being the subject of a specific X-ray. however, Dr. Sheldon, would not examine Investigator Caruso to rule him out as the subject of the X-ray designated as Petitioner's Exhibit No. 12.

21. We find that at no time did the respondent insert any needles into the person of the investigator.

22. We find that respondent did hold himself out to practice acupuncture to the investigator.

23. We find that on at least two occasions, respondent referred patients to Louis Katz, M.D., 160 Commack Road, Commack, New York 11725 to perform a radiological diagnosis, (Respondent's Exhibits F and G).

Determination

We unanimously find and conclude that the charges contained in the First Specification, paragraph "Third", charging the respondent with practicing the profession of chiropractic beyond its authorized scope, have been proved by substantial legal evidence and we find the respondent guilty of the same.

We further unanimously find and conclude that the charges contained in the Second Specification, paragraph "Fourth", subparagraphs (a), (b), (c), (d), (e), (f), (g), (h) and (i), charging the respondent with unprofessional conduct, have been proved by substantial legal evidence and we find the respondent guilty of the same.

Recommendation

In determining the measure of discipline to be recommended in this case, we have taken the entire record into consideration. We are aware of respondent's interest in the profession of chiropractic, and of his hope that his children will also enter the profession. This panel, however, cannot condone respondent's actions in holding himself out to practice acupuncture and the taking of X-rays although he was licensed to do neither. We further cannot accept respondent's advertisements on this business card and letterhead as being in the best interest of the profession of chiropractic in that they are misleading, deceptive and sensational. Accordingly, we recommend to the Board of Regents that respondent's license to practice chiropractic in the State of New York, be suspended for a period of twenty-four (24) months, on each specificaiton of the charges, to run concurrently, that the final fifteen (15) months of said suspension be stayed, and that the respondent be placed on probation for a period of seven (7) years.

Dated: New York, New York
March , 1979

ARNOLD GOLSCHMIDT, D. C.

RICHARD CARNIVAL, D. C.

WILLIAM KUTNER, D. C.

KENNETH PADGETT, D. C.

DOMENIC FIRRIOLO, PhD.

RALPH PASCALE, D. C. (Alternate)

ARNOLD GOLDSCHMIDT, D. C., Chairman

Report of the Regents Review Committee.

THE UNIVERSITY OF THE STATE OF NEW YORK

IN THE MATTER

of

The Application for the revocation of the authorization and license heretofore granted to LEON J. SALOB to practice as a chiropractor in the State of New York, for the cancellation of his registration as such, and for such other relief as the premises warrant.

No. 1614

LEON J. SALOB, hereinafter referred to as respondent, was licensed to practice as a chiropractor in the State of New York by the New York State Education Department. Respondent was issued license No. 001674 and was registered with the Department from an address at 386 Town Line Road, Commack, New York.

On August 14, 1978 the instant disciplinary proceeding was commenced by the service of the notice of hearing and petition upon respondent.

The petition charged respondent with practicing the profession of chiropractic beyond its authorized scope (first specification) and with unprofessional conduct (second specification). A copy of the charges is annexed hereto, made a part hereof, and marked as exhibit "A".

We unanimously recommend that the Board of Regents accept the findings and determination of the Hearing Panel that respondent is guilty of each specification of the charges.

With respect to the measure of discipline to be imposed, we unanimously recommend that the Board of Regents accept the

recommendation of the Hearing Panel, to the extent that respondent's license to practice as a chiropractor in the State of New York be suspended for a period of twenty-four months upon each specification of the charges of which respondent was found guilty, said suspensions to run concurrently, that execution of the last fifteen months of said suspensions be stayed and that respondent then be placed on probation, and modify the recommendation to the extent that the period of said probation be decreased to five years. We also unanimously recommend to the Board of Regents that said probation be subject to the terms set forth in the exhibit annexed hereto, made a part hereof, and marked as exhibit "C".

May 16, 1979

Respectfully submitted,

LOUISE P. MATTEONI
PATRICK J. PICARIELLO
GEORGE A. SPOHR, JR.

LOUISE P. MATTEONI
Chairman

Order of Gordon M. Ambach, Commissioner of Education of the State of New York.

THE UNIVERSITY OF THE STATE OF NEW YORK

IN THE MATTER

of

The Application for the revocation of the authorization and license heretofore granted to LEON J. SALOB to practice as a chiropractor in the State of New York, for the cancellation of his registration as such, and for such other relief as the premises warrant.

No. 1614

Upon the report of the Regents Review Committee, dated May 16, 1979, and vote of the Board of Regents on May 24, 1979, which report and vote are incorporated herein and made a part hereof, it is

ORDERED that the findings and determination of the Hearing Panel of the Committee on Professional Conduct of the State Board for Chiropractic in the matter of Leon J. Salob, respondent, be accepted; that the recommendation of the Hearing Panel as to the measure of discipline be accepted except as to the period of probation which should be modified; that the recommendations of the Regents Review Committee be accepted; that respondent is guilty of each specification of the charges; that respondent's liquor license and registration to practice as a chiropractor in the State of New York be suspended for a period of twenty-four months upon each specification of the charges of which respondent was found guilty, said suspensions to run concurrently; that execution of the last fifteen months of said

suspensions be stayed and respondent then be placed on probation for a period of five years under the terms set forth in the exhibit annexed hereto, made a part hereof, and marked as exhibit "A"; and that this order shall take effect seven days after its service unless said seven day period is waived, in writing, by respondent.

IN WITNESS WHEREOF, I, Gordon M. Ambach, Commissioner of Education of the State of New York, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 11th day of June, 1979.

GORDON M. AMBACH

(Seal.)

Approved May 24, 1979

Upon the report of the Regents Review Committee, under Calendar No. 1614, and in accordance with the provisions of Title VIII of the Education Law, it was

Voted: That the findings and determination of the Hearing Panel of the Committee on Professional Conduct of the State Board for Chiropractic in the matter of Leon J. Salob, respondent, be accepted; that the recommendation of the Hearing Panel as to the measure of discipline be accepted except as to the period of probation which should be modified; that the recommendations of the Regents Review Committee be accepted; that respondent is guilty of each specification of the charges; that respondent's license and registration to practice as a chiropractor in the State of New York be suspended for a period of twenty-four months upon each specification of the charges of which respondent was found guilty, said suspensions to run concurrently; that execution of the last fifteen months of said suspensions be stayed and respondent be placed on probation for a period of five years under the terms set forth in the report of the Regents Review Committee; that the Commissioner of Education be empowered to execute, for and on behalf of the Board of Regents, an order to carry out the terms of this vote; and that said order shall take effect seven days after its service unless said seven day period is waived, in writing, by respondent.

Statutes.

The Fourth Amendment reads:

> "The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

Amendment XIV reads:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

Transcript: Minutes of the Hearing.

(63) Mr. Gulitz: What time are you talking about?

The Chairman: Whenever we call for him. There are ways that one can determine that those are his X-rays or not, but we need the witness here.

Mr. Gulitz: The investigator would be available if you need him.

I would like to have this document marked as Exhibit No. 13 for identification.This document marked as Exhibit No. 14 for identification and Exhibit 15 for identification on the third document.

(Documents were marked Petitioner's Exhibits 13, 14 and 15 for identification.)

Mr. Hanrahan: I am going to make objection and say this would not be admissible in a court of law under no circumstances. I make this statement in my many years of practice.

The Chairman: What would never be admissible?

Mr. Hanrahan: That print would be ruled out never to be considered by anyone. Certainly a jury or a judge.

The Chairman: You realize, of course, this is not a court of law, Mr. Hanrahan.

Mr. Hanrahan: That is why you must be more careful on the rules upon a man's profession and upon (64) his livelihood and upon due process and in particular as the fairness to be given. I am only stating a statement here that I think needs no elaboration.

* * *

Mr. Gulitz: May I point out one point of law. Section 6510 excuse me, 2B, conduct of a hearing states in part, the panel shall not be bound by the rules of evidence. But, it's determination of guilt should be based on substantially legal evidence.

The Chairman: You may now continue.

(104) By Mr. Hanrahan:

Q. How long have you been an investigator for the Department of Education? A. I have been an investigator since March 16th of this year.

Q. And prior to that, were you an investigator for any other organization? A. No, sir. I wasn't.

Q. Did you attend any school at all for investigation? A. I had training on the job.

Q. That means you did not attend any school? A. No, sir.

Q. You didn't attend any police academy, any FBI academy or anything of that nature? Is that correct? A. No. I didn't.

Q. You were hired as an investigator with no previous experience; is that correct, sir? A. No previous investigative experience?

Q. That's right. A. That's right.

Q. Now, you know Howard Davis, do you now, the attorney for the Chiropractors? A. I never met the man.

Q. Did you consult with any attorney relative to this

* * *

(106) A. I believe I mentioned that the complaint originated from a referral by Howard Davis.

Q. Did you go to see Howard Davis as a result of a referral? A. No, sir. I didn't.

Q. Did you, at any time on—after your visit—prior to your first visit on May 8, 1976—or '78, as you say, that you went to the office of Dr. Salob, did you obtain an administrative warrant? A. No, sir. I didn't.

Q. And after you visited the office of Dr. Salob on May 8, 1978, did you, between the time of May 8th—or on May 2nd, rather, 1978 and June 2nd, 1978, did you attempt to obtain any warrant of any kind? A. No, sir.

Q. Did you then after June the 2nd, did you go and attempt to get a warrant at any time? A. No. I didn't.

Q. Did you on May 19th, after you had visited Dr. Salob and between the periods of May 19, 1978 and June the 2nd, did you attempt to get a warrant? A. No. I didn't.

Q. So that it is your testimony, if I understand, that you neither got a search warrant nor an administrative (107) warrant, in particular, to go into the offices of this doctor; is that correct? A. That is correct.

Q. And you likewise went into part of his home; isn't that correct, sir? A. Not to my knowledge.

Q. Well, wasn't his home and his office both directly connected, sir? A. I don't know how they were connected.

Q. You never went in—you never inquired as to how they were connected? A. No. I didn't

Q. Now, at the—

Mr. Hanrahan: May I, gentlemen, with respect to the situation of entering the home of—or entering the office of Dr. Salob—

Q. You obtained no affirmation or anything under oath with respect to any suspicion or reasonable suspicion concerning the activities of Dr. Salob; isn't that correct? A. An affirmation?

Q. You did nothing with respect to any legal document to give you access into the office of Dr. Salob; is that correct, sir?

* * *

(111) of the materials that were obtained in the office of Dr. Salob based upon the fact that this man made—

May be be excused at this time?

May I make my argument not in his presence?

May I do that just briefly? I will not waste time.

The Chairman: yes.

Mr. Caruso, stay right nearby so we can get to you again.

The Witness: All right.

(Whereupon the witness leaves the hearing room.)

Mr. Hanrahan: He has stated here under oath that he entered his office without an administrative warrant of the State of New York or without any authority to enter said office.

He stated further, as I know, that he had previously under examination, obtained a lot of materials from the office of the said Dr. Salob.

It is our contention on our motion to suppress that that is Constitutionally defective. His entry into the office under Camera versus Municipal Court under 387 Section 523 which is binding on the Board of Education of the State of New York and also, C. versus Seattle 387 U. S. 541. And the recent case decided by (112) the United States Supreme Court, the Barlow case, all dealing with administrative procedures and all dealing with significant intrusions into the office—into the factories, into administrative proceedings that are necessarily carried out before there can be an invasion under our laws in this country into any man's office or any man's factory or any man's place of business.

This man has testified under oath that he consulted no lawyer. He consulted no one.

He has exonerated, apparently, on the surface, Howard Davis.

That he did this on his own, having no investigative experience, comes in and seizes various things from the office which have now been in evidence here and have been permitted to be in evidence.

It is my contention that under the Fourth and Fifth Amendments of our Constitution, that the incriminating evidence, if it may be termed so, self-incriminating evidence seized under the Fifth Amendment and the Fourth Amendment interlocked, both pertain to the question of whether he had legal authority to enter the premises. And I say that under our case law of the United States Supreme Court which deals with administrative (113) procedure and which must be recognized by the Board of Education of the State of New York or any administrative body, the Supreme Court is the law of this land. If the Board of Education of the State of New York does not recognize it, then it is committing grievous error in this case.

We are confronted here with violations of the Constitutional rights of every chiropractor present before and sitting in judgment on this chiropractor and I say that the United States Constitution has got to be upheld above all things. That is why I move on the suppression, because the Fourth Amendment—and we don't have to go back to the colonists, but the Fourth Amendment deals primarily with the question of an oath or affirmation to be made with respect to the seizure of persons, places, documents or anything else of a person and there must be a warrant issued. That is what this country is based upon.

I also say that the Fifth Amendment says that no man can be incriminated by these documents or anything of that nature to be used against him.

Under the Fourth and Fifth Amendments, I am asking here that everything that was presented here, both the oral testimony given here by this investigator as well (114) as the tangible evidence that he says he seized from Dr. Salob's office now be suppressed here with respect to the entire case.

* * *

(139) A. On May 2nd?

Q. Yes. A. No. He did not.

Q. You have read over your minutes very carefully of your reports, have you not, before you came in this morning? A. Yes, sir.

Q. And when you say the doctor did not take X-rays, he did not take X-rays as you say, on May 2nd; isn't that correct? A. That is correct.

Q. Incidentally, during the three times you were present as you claim in his office both on May 2nd, May 19th and June 2nd, did the doctor at any time give you—or did he place any needles into your body? A. No. He did not.

Q. And did he, at any time, use any pressure points on you?

Mr. Gutilz: Objection. Unless the witness knows what he means by pressure point.

The Chairman: Will you explain that, Mr. Hanrahan?

Mr. Hanrahan: Yes. This is an investigator. I think you would be more in a position to explain that to him, but I will ask him.

Q. Did the doctor use any instrument upon your body? (140) A. No.

Mr. Gulitz: Are we still taking about May 2nd?

The Chairman: He said on all those occasions.

Mr. Hanrahan: On all those occasions.

Q. Now, you spoke to the doctor, did you not, about acupuncture, did you not? A. Yes. I did.

Q. Now, did the doctor—in consultation or in the bill, was there any mention at all about anything concerning acupuncture?

Is there anything in the bill? A. In the bill, no.

Q. And is there anything in that bill which shows that there was X-rays taken of your body? A. No. There is not.

Q. Now, you were present at the time you say that this bill was written out, were you not. A. That is correct.

Q. And you say, in your presence and after the bill had been written out, you took the bill and you gave the doctor $15; is that correct? A. That is correct.

Q. Now, was that $15 in marked money? A. No. It wasn't.

* * *

Letters Demonstrating Competency and Chiropractic Advancement.

Office Hours:
By Appointment Only
Monday Thru Sunday

Have Hands—Will Travel
Wire 864-3931

Dr. L. J. Salob
Chiropractor
386 Town Line Road
Commack, N.Y. 11735

April 19, 1980

Donald B. Tower, M. D.
Director of The N.I.N.C.D.S.
Department of Health and Welfare
Bethesda, Maryland 20205

Dear Doctor Tower:

I received from Congressman Carney your letter to him dated April 2, 1980 in regard to my findings of a Quadriplegic and a request for a Research Grant in that report. In addition, you have already read the Rusk Institute findings of this Quadriplegic in question, plus my reports for eight months on that case.

I received the brochure about the function of your organization (NINCDS) but did not have the FORM NIH 398 enclosed with said brochure. My request for a research grant I trust will be acknowledged by your office immediately. You can see the patient's recovery levels yourself anytime you wish. This is an open invitation which should satisfy any researcher by seeing with one's own eyes, and speaking to the patient directly. You have had a great deal of experience in situations which need special attention, therefore I feel that you could break any red-tape that might hinder this scientific endeavor.

It must be obvious to you that I'm putting my neck out all the way on behalf of over 150,000 individuals who are either paraplegics or quadriplegics. Their futures will depend upon

someone who will seek the truth and act accordingly. In a very concise manner I shall list the particular case's recovery levels at this hour for your perusal.

1. Patient is off all medication, and has been off this for over 8 months. I have taken care of him for 10 months so far. His emotional level is outstanding as well as his mental capabilities.
2. He can raise his arms, move his fingers, and do all of this voluntarily.
3. He can raise his two legs and toes voluntarily.
4. He has control of his bowels, and almost control of his bladder.
5. He is always hot not cold throughout his body.
6. He can move his neck voluntarily and can sit in his wheelchair for over 7 hours without his neck and head drooping to the side.
7. A great deal of muscle tone has occurred throughout his body, in particular his abdominal muscles, shoulders, and upper arm (Biceps, Triceps).

The techniques I devised are new, safe, and very effective. So far over the 120 month span of therapy, the patient has kept the recovery levels he reaches, plus new advents occur each month which enthuses even more. This makes him work harder and longer in the exercises I taught him to do. If I am correct, he shall be able to sit up by himself, and if all goes well possibly walk within the next two months. If you read his case thoroughly you'll remember that he had major surgery three times in the area of the right hip, femur, and sacrum. That is one of the obstacles I'm attempting to overcome.

This short letter is my way of imploring you to please work with me for the ultimate good of humanity. I hope to hear from you as soon as possible. I thank you for your efforts.

Dr. L. Salob, D.C.

Department of Health, Education and Welfare
Public Health Service
National Institutes of Health
Bethesda, Maryland 20205

April 2, 1980

The Honorable William Carney
House of Representatives
Washington, D. C. 20515

Dear Mr. Carney:

Your letter of March 5 addressed to the Office of the Assistant Secretary for Legislation, Department of Health, Education, and Welfare, and the attached correspondence from Dr. L. J. Salob concerning chiropractice, have been referred to this Institute for reply. Dr. Salob is interested in obtaining Federal support to test theories and techniques that he says have benefited a quadraplegic patient in his care.

The National Institute of Neurological and Communicative Disorders and Stroke (NINCDS), a unit of the National Institutes of Health (NIH), supports research on spinal cord injury and regeneration in the central nervous system. The mechanisms, terms, and conditions of support are described in the enclosed brochure. Should Dr. Salob decide to submit a research grant application to the NIH, I can assure you that his proposal will receive thorough and sympathetic consideration within the scientific merit guidelines that apply to all NIH research grant applications.

If I can provide you with additional information about the programs of the NINCDS or assist you in any other way, please let me know.

Sincerely,

DONALD B. TOWER, M. D.
Director
National Institute of Neurological
and Communicative Disorders and Stroke

Enclosure

Supreme Court, U. S.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-1815

DR. LEON SALOB,

Petitioner,

against

GORDON M. AMBACH, Commissioner of Education of the State of New York, NEW YORK STATE EDUCATION DEPARTMENT and THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

Supplementary Appendix to Petition for Writ of Certiorari to the United States Supreme Court from the Court of Appeals of the State of New York.

JAMES J. HANRAHAN
Counsel for Petitioner
185 Fairmount Avenue
Glen Rock, N. J. 07452
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New York Supreme Court, Appellate Division, Third Judicial Department Opinion, Dated December 20, 1979

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

December 20, 1979 35953

IN THE MATTER

of

LEON SALOB,

Petitioner,

v.

GORDON AMBACH, as Commissioner of Education of the State of New York, *et al.*,

Respondents.

Proceeding initiated in this court, pursuant to section 6510 (subd. 4) of the Education Law, to annul a determination of the Commissioner of Education suspending petitioner's license to practice chiropractic.

Petitioner, a chiropractor, was charged with practicing the profession of chiropractic beyond its authorized scope and with unprofessional conduct within the purview and meaning of subdivisions (2) and (9) of section 6509 of the Education Law. In the first specification charging petitioner with practicing the profession of chiropractic beyond its authorized scope, it was alleged that petitioner, while not authorized to use X-rays, did

in fact X-ray an agent of the New York State Education Department at his chiropractic office on or about May 19, 1978. Petitioner was charged in the second specification with unprofessional conduct based upon the conduct set forth in the first specification. He was also charged with additional acts of unprofessional conduct in the second specification, including wilfully misrepresenting to the State Education Department that he would not X-ray patients until duly licensed; holding himself out as being able to practice acupuncture; engaging in deceptive and misleading advertising; using the word "Doctor" with his name without indicating the profession in which he held a doctorate; claiming professional superiority or special professional abilities in an area in which he was not qualified or certified to practice; and practicing the profession of chiropractic under an assumed name without registering the assumed name with the County Clerk.

A hearing was held at which an investigator for the State Education Department testified that on three occasions he visited petitioner's office which was attached to his home; that he photographed a prominent sign outside petitioner's office stating "Acupuncture"; that in the reception area of the office he took petitioner's business card from a rack on the wall and some pamphlets concerning acupuncture and X-ray; that on May 19, 1978 petitioner took an X-ray of the investigator at his office; and that on June 2, 1978 petitioner again reviewed the X-ray with him and then gave him the X-ray because he told petitioner he thought it best to seek treatment closer to home. The hearing panel found petitioner guilty of each of the charges. The panel recommended a two-year suspension on each of the specifications, to run concurrently, and that the final 15 months of the suspension be stayed and petitioner be placed on probation for seven years. Thereafter, the Regents Review Committee unanimously adopted the findings of the hearing panel, but recommended modification of the period of probation to five years. The Board of Regents accepted the recommendations of the Regents Review Committee. On June 11, 1979, the Commissioner of Education executed the order effectuating the decision of the Regents. This article 78 proceeding ensued to annul the order of the Commissioner of Education.

Initially, petitioner contends that the pamphlets and other materials taken from his office should not have been admitted into evidence at the hearing because they were removed without an administrative warrant in violation of the Fourth and Fifth Amendments of the United States Constitution. The protection against unreasonable searches and seizures, however, does not extend to property knowingly exposed to the public, even in a person's own home or office (*Katz v. United States,* 389 U. S. 349, 351). The materials in question were taken from the area of petitioner's office open to the public and, accordingly, they were properly admitted.

We reject petitioner's argument that the X-ray admitted into evidence should have been suppressed on the ground that it was not properly identified as an X-ray of the investigator. Identification of the X-ray raised a question of fact for resolution by the triers of fact (*Matter of Shepard v. Ambach,* 68 A. D. 2d 984). The finding as to identification is, in our view, supported by substantial evidence and should not be disturbed.

Petitioner's contention that the claim of custody of the X-ray was not established must also be rejected. There existed reasonable assurances of the identity and unchanged condition of the X-ray and, consequently, it was properly ruled admissible (*People v. Julian,* 41 N. Y. 2d 340, 343).

Based upon our examination of the entire record, it is the opinion of this court that the determination of the Commissioner of Education is supported by substantial evidence, and, therefore, it should be confirmed (*Matter of Sang Moon Kim v. Ambach,* 68 A. D. 2d 986). We have considered petitioner's remaining arguments and find them unpersuasive.

Determination confirmed, and petition dismissed, without costs.

Mahoney, P. J., Greenblott, Sweeney, Staley, Jr., and Mikoll, JJ., concur.

New York Supreme Court, Appellate Division, Third Judicial Department Order, Dated December 26, 1979.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department at the Justice Building, in the City of Albany, New York, commencing on the 13th day of November, 1979.

Present:

Hon. A. Franklin Mahoney,
Presiding Justice,
Hon. Louis M. Greenblott,
Hon. Michael E. Sweeney,
Hon. Ellis J. Staley, Jr.,
Hon. Ann T. Mikoll,
Associate Justices.

IN THE MATTER

of

The Application of LEON SALOB,

Petitioner,

against

GORDON M. AMBACH, Commissioner of Education of the State of New York, NEW YORK STATE EDUCATION DEPARTMENT and THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

The petitioner, Leon Salob, having instituted this proceeding pursuant to Education Law §6510, subd. 4, to review an order of the Commissioner of Education which suspended his license as a chiropractor in the State of New York for a period of twenty-four months but stayed the last fifteen months and placed petitioner on probation for that period under stated terms; and the said proceeding having been argued during the above stated term of Court by James J. Hanrahan, Esq., of counsel for petitioner, and by John J. O'Grady, Assistant Attorney General, of counsel for the respondents, and after due deliberation, the Court having rendered a decision on the 20th day of December, 1979, it is hereby

ORDERED, that the determination be and the same is hereby confirmed and the petition is dismissed without costs.

Dated and Entered: December 26, 1979.

Enter

JOHN J. O'BRIEN
Clerk

A True Copy
JOHN J. O'BRIEN
Clerk

(Seal.)

Decision of Burton G. Roberts, Justice of Supreme Court, State of New York, October 25, 1978.

SUPREME COURT OF THE STATE OF NEW YORK,

NEW YORK COUNTY,

Special Term, Part 1A,

at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present:

Hon. Burton G. Roberts, Justice.

In *re:* LEON J. SALOB.

The following papers numbered 1 to read on this motion No. on Calendar of Oct. 23, 1978 submitted

	Papers Numbered
Filed Order to Show Cause and Affidavits Annexed	1 and 2
Answering Affidavit	4-6
Admission Affidavit of Service	3
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Upon the foregoing papers this motion by defendant for multiple disclosures is denied. As stated in *Anyone v. State Liquor Authority,* 47 M. 2d 809, 810, "This Court will not interfere in any pending matter before an administrative agency.

However, as such time as the hearings are completed and a final determination is rendered and error alleged to have been committed by the hearing officer is subject to the view of this Court * * *." See also *Taibbis v. State Liquor Authority,* 48 A. D. 2d 569. A copy of this order with notice of entry shall be served no later than 30 after publication hereof.

Dated 10-25-78

BURTON G. ROBERTS
J. S. C.

County Clerk's No. 17966, 1978
Spec I Liber S266, Line 2, 1978

Briefs: Petitioner's X Respondent's X

Filed
Nov. 2, 1978
New York
Co. Clerk's Office

Order, With Notice of Entry, Duly Filed November 2, 1979.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK. 17966/78

In *re:* LEON J. SALOB.

Sirs:

Please Take Notice, that the annexed order is a copy of an order duly entered in the above entitled action and filed in the office of the Clerk of the County of New York on the 2nd day of November, 1978.

Dated: New York, New York
3rd day of November, 1978

Yours, etc.

LOUIS J. LEFKOWITZ
Attorney General
Attorney for the New York State
Education Department
Office and P. O. Address
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New York, New York 10017

To:

James J. Hanrahan
Attorney for Leon J. Salob, D. C.
202 East 110th Street
New York, New York 10029

Filed
Nov. 9, 1978
New York
County Clerk's Office

Transcript—Minutes of Hearing—Page 193.

Mr. Hanrahan: I am going to object to does this memo actually reflect—

This man is reading from his memo and he is answering the question.

We do not have testimony here.

There has been no question of foundation laid for the witness' failure to remember and I think that is highly improper now, at this late stage of the game to be asking him proper redirect questions, to be laying no foundation for refreshment of the evidence and it is leading to a disorganization here with respect to not only no rules of evidence, but any semblance of evidence.

Supreme Court, U. S.
FILED
JUL 14 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79—1815

DR. LEON SALOB,

Petitioner,

against

GORDON M. AMBACH, Commissioner of Education of the State of New York, NEW YORK STATE EDUCATION DEPARTMENT and THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79—1815

DR. LEON SALOB,

Petitioner,

against

GORDON M. AMBACH, Commissioner of Education of the State of New York, NEW YORK STATE EDUCATION DEPARTMENT and THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO CERTIORARI

Opinion Below

The opinion of the New York Supreme Court, Appellate Division, Third Department is reported at 73 AD 2d 756 and is reproduced in full in petitioner's Supplementary Appendix, pp. 41-43.

The New York Court of Appeals denied leave to appeal to that Court on February 20, 1980 (49 NY 2d 703). That order is reproduced in the Petition at p. 13.

Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to 28 USC § 1257(c) and United States Constitution Article 3.

Questions Presented

Was petitioner's right to be free from unreasonable search and seizure violated when a state investigator posing as a patient entered petitioner's chiropractice office, underwent X-ray treatment and took brochures, business cards and letterheads from a public display table in the office without warrant?

Is the provision of New York State Education Law § 6510, subd. 2(b) providing that in administrative disciplinary hearings "[t]he panel shall not be bound by the rules of evidence, but its determination of guilt shall be based on substantial legal evidence", violative of petitioner's constitutional rights?

Statement of the Case

Petitioner, a New York licensed chiropractor, was found guilty in a disciplinary hearing before a New York State administrative agency of practicing the profession of chiropractic beyond its authorized scope and of unprofessional conduct in violation of New York Education Law § 6509, subds.. 2 and 9 respectively, notably by taking X-rays of an agent of the New York State Education Department while not authorized to use X-ray in his practice.*

---

* Under New York Education Law § 6556 (subd. 1) petitioner is required to take and pass a separate examination before being authorized to take X-rays. Petitioner has failed to pass that examination.

Petitioner was charged with additional acts of unprofessional conduct, *to wit,* deliberately and wilfully misrepresenting to the licensing agency that he would not X-ray patients until duly licensed; holding himself out to practice acupuncture; engaging in deceptive, misleading and sensational advertising; using the title "Doctor" without indicating the profession in which he held a doctorate, contrary to law; claiming special professional attainments he did not possess; and practicing chiropractic under an assumed name which he did not register.

The administrative agency found petitioner guilty of each of the charges based on substantial legal evidence. Following administrative review, the agency suspended his license for 24 months but stayed the last 15 months of the suspension, resulting in an actual 9 month suspension. This suspension became effective on or about February 28, 1980, five days after the order of the Court of Appeals denying leave to appeal was mailed to counsel.

Petitioner sought State judicial review by instituting a petition under New York Civil Practice Law and Rules § 7800 et seq. and Education Law § 6510, subd. 4. On December 20, 1979, the Appellate Division of the New York State Supreme Court rendered a decision unanimously confirming the order of the administrative agency and dismissed the petition (Supplementary Appendix pp. 41-43).

Petitioner moved for leave to appeal to the New York State Court of Appeals. The Court of Appeals denied leave by order dated and entered February 20, 1980 (Pet. p. 13). An appeal purportedly as of right was dismissed by the Court on the ground that no substantial constitutional question was directly involved (Pet. p. 13).

Statutes Involved

Education Law § 6509. Definitions of professional misconduct.

Each of the following is professional misconduct, and any licensee found guilty of such misconduct under the procedures prescribed in section sixty-five hundred ten shall be subject to the penalties prescribed in section sixty-five hundred eleven:

* * *

2. Practicing the profession fraudulently, beyond its authorized scope, . . .

* * *

9. Committing unprofessional conduct as defined by the board of regents in its rules or by the commissioner in regulations approved by the board of regents.

Section 6551. Definition of practice of chiropractic.

1. The practice of the profession of chiropractic is defined as detecting and correcting by manual or mechanical means structural imbalance, distortion, or subluxations in the human body for the purpose of removing nerve interference and the effects thereof, where such interference is the result of or related to distortion, misalignment or subluxation of or in the vertebral column.

2. a. A license to practice as a chiropractor shall not permit the holder thereof to use radio-therapy, fluoroscopy, or any form of ionizing radiation except x-ray which may be used only as follows:

(1) X-ray shall only be used for the purposes of chiropractic analysis;

(2) Such use of X-ray shall be confined to persons over the age of 18; and

(3) The era of such X-ray exposure shall not extend below the level of the top of the first lumbar vertebra.

* * *

Section 6556. Special provisions

1. Any chiropractor who holds a license stating that the holder is not authorized to use X-ray in his practice shall in each registration, continue to obtain a license so marked. Any chiropractor holding such a license may obtain a license permitting the use of X-ray provided he first passes an examination in the use and effect of X-ray satisfactory to the board and the department.

* * *

Rules of the New York State Board of Regents (8 NYCRR)
Section 29.1 General provisions for all professions.

(a) Unprofessional conduct shall be the conduct prohibited by this section. The provisions of these rules applicable to a particular profession may define additional acts or omissions as unprofessional conduct and may establish exceptions to these general prohibitions.

(b) Unprofessional conduct in the practice of any profession licensed or certified pursuant to title 8 of the Education Law shall include:

(1) willful or grossly negligent failure to comply with substantial provisions of Federal, State or local laws, rules or regulations governing the practice of the profession;

* * *

(9) practicing or offering to practice beyond the scope permitted by law, or accepting and performing professional responsibilities which the licensee knows or

has reason to know that he or she is not competent to perform. . . .

• • •

(12) advertising or soliciting for patronage that is not in the public interest:

(i) advertising or soliciting not in the public interest shall include but not be limited to advertising that:

(a) is false, fraudulent, deceptive, misleading, sensational or flamboyant;

• • •

(f) makes claims of professional superiority which can not be substantiated by the licensee, who shall have the burden of proof . . .

Section 29.2. General provisions for health professions.

(a) Unprofessional conduct shall also include, in the professions of . . . chiropractic . . .

• • •

(4) using the word "Doctor" in offering to perform professional services without also indicating the profession in which the licensee holds a doctorate. . . ."

The Findings

Upon the entire record of an administrative hearing at which the principal witnesses were petitioner and the investigator for the State Education Department, the panel found as fact, that petitioner was licensed to practice chiropractic in the State of New York but that his license did not include the authority to use X-ray, and that petitioner was not licensed to practice medicine, dentistry or acupuncture. Investigator Caruso took two photographs of the premises to be used in evidence. The photographs were

taken from the street in front of petitioner's premises and show signs stating "Commack Chiropractic Office", "Acupuncture" and "Dr. L.J. Salob, Chiropractor".

The panel further found that the investigator walked up to the door of the office, which bore a sign stating "Ring bell, walk in". He rang the bell and entered.

In the waiting room, the investigator removed a business card from a wall rack in the waiting room; obtained a piece of blank stationery with letterhead and a pamphlet. The panel found that those documents were taken from an area in petitioner's office where they were offered to the general public as part of petitioner's practice.

The panel found that petitioner's business card contains the information "Dr. L.J. Salob, Commack Chiropractic Center", and the phrase "Have hands, will travel, wire 864-3931" and that his letterhead contains the same information except that the word "Office" is used instead of the word "Center" in the phrase "Commack Chiropractic Office".

The panel found that petitioner did not register the name "Commack Chiropractic Center" which appeared on his letterheads and bill forms with the Suffolk County Clerk's office.

The panel found that on May 2, 1978, the investigator met with petitioner and discussed whether acupuncture would help alleviate pain and muscle spasms in his right arm. Petitioner recommended an X-ray be taken to determine if acupuncture was needed. The panel found that on May 19, 1978, the investigator returned to petitioner's office pursuant to appointment, at which time petitioner took an X-ray of the investigator.

The panel found that on May 19, 1978, the investigator, with the approval of petitioner, took two pamphlets from the counter in petitioner's waiting room. The pamphlets

are entitled "Why you need X-ray" and "Arm and shoulder pain".

The panel found that on June 2, 1978, when the investigator returned to petitioner's office, petitioner drew "plumb lines" on the X-ray he had taken on May 19, 1978 and advised the investigator that he found a three-quarter inch difference in the height of the investigator's shoulder structure. Petitioner then gave the investigator the X-ray so that he could continue treatments with a chiropractor closer to the investigator's home.

The panel specifically found that the X-ray which Investigator Caruso identified, was, in fact, the X-ray of that investigator. The panel rejected the opinion of Dr. Sheldon, petitioner's expert. In rejecting his opinion, the panel noted that Dr. Sheldon, although testifying that a visual examination of a person could rule out that person as the subject of a specific X-ray, refused to examine Caruso to rule him out as a subject of the X-ray in evidence.

The panel found that petitioner held himself out to Investigator Caruso as being able to practice acupuncture.

Reasons For Denying The Writ

Petitioner has failed to raise any question of general importance warranting the exercise of this Court's certiorari jurisdiction, Rule 19(1).

As To The Alleged Search:

Petitioner appears to imply that in some way his Fourth, Fifth and Fourteenth Amendment rights were violated by an agent of the licensing authority entering his office premises as a patient to determine if petitioner was violating the law. Such undercover work has been held to be a necessary part of law enforcement, *Lewis* v. *United States,* 385 U.S. 206 (1966). Certainly, where petitioner invites

the public to enter his professional office, even when that office is in his home, he must assume that agents of the licensing authority might also enter to check his compliance with the law. *Harris* v. *United States,* 390 U.S. 234 (1968).

Petitioner cites no case which requires an undercover investigator posing as a member of the public to produce a warrant to enter a public, professional office.

Petitioner next infers that his rights were violated when the agent, from the public street, photographed the signs petitioner placed on the side of his house (wherein he conducted his offices). No warrant was required for that, *Air Pollution Variance Board* v. *Western Alfalfa Corp.,* 416 U.S. 861 (1974).

Nor was a warrant required to take pamphlets or other written material displayed on a public table or rack in his public reception room. This material was in the nature of advertising which petitioner expected patients and visitors to take, not personal books or records which he intended to be private. *Katz* v. *United States,* 389 U.S. 349, 351 (1967).

As To The Rules of Evidence

Citing no authority, petitioner claims violations of his rights in the receipt into evidence of an X-ray which he took of the State's agent and which he claims was not properly identified and connected to him. However, the agent testified that petitioner took an X-ray; discussed that X-ray with him on two visits; drew lines on the X-ray to show an alleged condition; and then gave the X-ray to the agent. All these factors, which petitioner ignores, are in the hearing record. The agent kept the X-rays he received from petitioner for the very purpose of the hearing.

The Courts of New York State have determined as a matter of New York law that the findings of facts as set

forth *supra* were based on substantial evidence and hence binding upon petitioner, *300 Gramatan Avenue Assoc.* v. *State Division of Human Rights,* 45 NY 2d 176 (1978). The technical rules of evidence do not apply to the administrative hearing herein, but the findings must be based on substantial legal evidence N.Y. Educ. L. § 6510(2b); *Matter of Erdman* v. *Ingraham,* 28 AD 2d 5 (1st Dept, 1967) app. withdrawn 20 NY 2d 768 (1967).

Petitioner has failed to show that the hearing panel was prejudiced. In assessing a measure of discipline for the unprofessional act of taking an X-ray without authority, the panel took into account that petitioner had previously been warned for the same misconduct. Under New York law this was a valid consideration. *Matter of Pell* v. *Board of Education,* 34 NY 2d 222, 240 (1974).

CONCLUSION

Certiorari should be denied.

Dated: New York, New York
July 7, 1980

Respectfully submitted,

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Assistant Attorneys General
of Counsel

Supreme Court, U. S.
FILED
JUL 30 1980
MICHAEL RODAK, JR., CLERK

No. 79-1815

IN THE

Supreme Court of the United States

October Term 1980.

DR. LEON SALOB,

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against

GORDON M. AMBACH, Commissioner of Education of the State of New York, NEW YORK STATE EDUCATION DEPARTMENT and THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

Reply Brief for Petitioner in Support of Petition for Writ of Certiorari.

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Glen Rock, N. J. 07452
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980.

No. 79-1815

DR. LEON SALOB,

Petitioner,

against

GORDON M. AMBACH, Commissioner of Education of the State of New York, NEW YORK STATE EDUCATION DEPARTMENT and the UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

With respect to the respondent's brief and in replying to his point "As to the alleged Search" the constitutional issue was raised by a written timely motion at the hearing in the form of a motion to suppress all alleged contraband and alleged oral statements under the 4th and 5th Amendments to the U.S. Constitution but was considered improper under the Hearing Manual as no motions could be raised under said Manual instructions to the Hearing Boards.

In this case not one patient testified against Doctor Salob and the sole witness against him was a state investigator who entered his office located in his home without a warrant for any violation on three separate occasions, May 2, May 19 and June 2, 1978, and whose unconsented entry without showing of any exigent circumstances, into the outer office and inner office and the seizure of pamphlets, booklets and an alleged X-ray—the crux of the case which was impossible of identification as a Hodge Podge as testified to by the expert in radiology for over 40 years Doctor Sheldon, for the defense and uncontradicted by the State Investigator who identified said sole X-ray upon information and belief. Further as the sole witness he changed his story several times.

In *Mapp vs. Ohio,* 367 U. S. 643, 655, the Supreme Court of the United States said, "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a State Court." *No distinction is made between the admissibility of such evidence in civil and criminal cases.* The *Mapp* decision applying the 4th Amendment is applicable here since its impact is on the govenmental seizure only.

The New York State Courts in the case at bar apparently did not recognize the decision of *Finn's Liquor Shop vs. State Liquor Authority,* 24 N. Y. 2d 647, holding that "no state may require as a condition of doing business, a blanket submission to warrantless searches at any time for any purposes * * * and *same applies to administrative proceedings.*"

The *Finn* case cites a number of cases in the State of New York which holds to this principle regarding administrative proceedings and at page 654 stated:

"It is no longer subject to question that state agencies charged with purely administrative responsibilities just as those engaged in the enforcement of Criminal law must conduct their investigative and enforcement functions in compliance with constitutional requirements and more particularly within the confines of the 4th Amendment (see *Camara vs. Municipal Ct.*, 387 U. S. 523a, 30-531); *See vs. City of Seattle,* 387 U. S. 54.

Page 655:

"The authority just as any other state agency is obligated to conduct its activities in conformity with the demands of the constitution. When its agents exceed those limits it should not be permitted to avail itself of the fruits of such unlawful activity in order to impose sanctions upon the persons whose constitutional rights have been violated."

Marshall vs. Barlow, 98 S. Ct. 1816;
Camara vs. Municipal Court, 387 U. S. 523, 528.

"The business man (the professional) like the occupant of a residence has a constitutional right to go about his business free from unreasonable official entries upon his private property."

The *Katz* case re-emphasized the *necessity of securing a warrant* to seize matters alleged to be incriminating.

Katz vs. U. S., 387 U. S. 357:

"Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes, *United States vs.*

> *Jeffers,* 342 U. S. 48, 51, and that searches conducted outside the judicial process without prior approval by Judge or Magistrate, are per se unreasonable under the Fourth Amendment.
>
> "Reversed for failure to obtain a warrant."

The *Katz* case went further and stated (pages 356, 357):

> "In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionable showing probable cause.' *Agnello vs. U. S.,* 269 U. S. 20, 33."

The *Lewis vs. United States,* 385 U. S. 206, 211, page 211:

> "A government agent in the same manner as a private person may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course this does not mean that whenever entry is obtained by invitation and the locus is authorized to conduct a general search for incriminating material a citation to the *Gouled* case, *supra,* is sufficient to dispose of that contention."

James Otis in his speech on February 24, 1761, in speaking against writs of assistance empowering search of Merchants at any time of night said "Custom house officers may enter our houses when any please * * * and whether they break through malice or revenge no man no court can inquire. Bare suspicion without oath is sufficient * * *.

What a scene does this open. Every man prompted by revenge, ill humor or wantonness to inspect the inside of the neighbor's House may get a writ of assistance; others will ask it from self defense. One arbitrary exertion will provoke another until society be involved in tumult and in blood * * *." (Treasury of the World's Greatest Speeches—Houston Peters—page 117.)

A letter of an alleged complaint about a sign of an unknown person initiated the specifications against Doctor Salob. A warrant, administrative or otherwise was never secured between May 2nd, May 19th and June 2nd, 1978, or any other time and thus moved from the realm of administrative search to criminal investigation by the alleged three times that the state investigator came to the office thereby necessitating strict adherence to Fourth Amendment proscription as the *"Abruzzi"* case herein cited sets forth.

Apparently the New York State Courts did not recognize another of their decisions in *People vs. Doctor Abruzzi,* 52 A. D. 2d 499, affirmed at 42 N. Y. 2d 813, suppressing all tangible and oral statements because of failure by the Police to obtain a warrant.

> "We first note that whether the Police have conducted a search within the meaning of the 4th Amendment depends not upon a property right in the invaded place but upon whether the area is one in which there is a reasonable expectation of freedom from governmental intrusion (*Katz vs. United States,* 389 U. S. 347, 352). Undoubtedly a doctor's office is such an area (*Mancusi vs. DeForte,* 392 U. S. 369). Consequently the failure by the Police to obtain a search warrant cannot be lightly excused (see *Coolidge vs. New Hampshire,* 403 U. S. 443, 444).

Dr. Salob did not testify in this case so that illegal evidence could not have been introduced against him and further the Fourth Amendment and the Fifth come into play when the accused is "the unwilling source of the evidence" (*Gouled vs. United States,* 255 U. S. 298), there being no difference "whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises."

The respondent cites *Lewis vs. United States,* 385 U. S. 206, as supporting their contentions however not only is the subject matter different, narcotics, but the circumstances of *privilege and confidential communication* are involved, between a doctor and his patient. Absent any waiver of physician-patient relationship as Doctor Salob did not take the stand or testify, under 4504 of the Civil Practice Act of the State of New York it is not expressly required that the communication or information be confidential in order to be protected. There was no waiver by Doctor Salob and of any patient-doctor relationship and any alleged documentary evidence of the sole witness and his testimony should have been suppressed upon this further grounds.

The respondent at page 5 cites *Harris vs. United States,* 390 U. S. 234, which deals with a police officer's right to search cars and seize evidence in plain view after the car had been impounded as evidence in a robbery. Neither this case nor the *Lewis* case at page 4 as cited gives rise to the proposition that when petitioner invites the public to enter his professional office, even when that office is in his home, he must assume that agents of the licensing authority might also enter to check his compliance with the law. In neither case was there an entry into professional man's premises or the doctor-patient relationship. *Air Pollution Variance Board vs. Western Alfalfa Corp.,* 416

U. S. 861, is an environmental case dealing with smoke and emission and the objection was not to taking picture of a sign alleged to be over the home of Doctor Salob, but the subsequent actions thereafter to attempt to secure incriminating evidence thereafter at three (3) separate visits without a warrant and not inquiring whether said sign was a referral sign.

In the *Matter of Erdman vs. Ingraham,* 28 A. D. 2d 5 (1st Dept. 1967), cited by the respondent the Appellate Division, First Department, of the City of New York saw fit to remand the matter to the commissioner for rehearing and reconsideration on the grounds that the petitioner was deprived of the right to cross-examine witnesses who had given statements to the investigator and which statements were part of the record and that such hearsay had a harmful and unfair effect.

The "no rules of evidence" under 6510(2)B of the New York State Education Laws leaves too much to the discretion of the Hearing Board to make lopsided rulings and ignore privilege, relevancy and its admissibility, irrelevant evidence, competency of witnesses, lack of personal knowledge, exclusion of relevant evidence on grounds of prejudice, confusion or waste of time, *res gestae* prior inconsistent statement, competency of Judges or referees to testify at the same trial they are presiding over, character evidence, hearsay and exception to the hearsay rules, etc.

This statute is constitutionally infirmed in that it does not afford procedural protections to the accused at the heart of the case. The hearing, admissibility and inadmissible evidence based upon rules of evidence, constitutional rights and civil rights. Without procedural safeguards and adequate standards fundamental constitutional rights are destroyed.

See

Marcus vs. Search Warrant, 367 U. S. 717.

Further overbreadth is fatal to this statute. There are no limitations and shifts the burden of proof in this civil proceeding to the accused for example when it denied the rebuttal evidence offered by the defense through its radiologist expert that the single X-ray offered by the Prosecutor was no identification of the body of the investigator or his dental work repudiating the prior entire Board's contention that it was and then eight months later demanding a comparative X-ray with the "Hodge Podge" X-ray offered in evidence. This is certainly not equal protection of the laws when the Board upholds its own decision on X-rays.

This standard of substantial legal proof is meaningless, when there are no rules of evidence. These decisions regarding constitutional guarantees are left by default to administrators who lack the power to rule upon constitutional questions and the Supreme Court has recognized repeatedly that a man is free to follow his chosen profession from unreasonable governmental interference and which comes within the liberty and property concepts of the fifth amendment.

The question of the *no rules of evidence* 6510 2B which has been challenged as unconstitutional by Dr. Salob in his brief to the Appellate Division, Third Department, State of New York, remained unanswered in its decision, stating it was a question of fact for resolution by the triers of fact, and in particular, stated that the X-ray of the investigator raised a fact question, and then concluded that the X-ray was properly ruled admissible. Can there be substantial legal evidence if there are no rules of evidence? Can there be legal evidence without the rules of evidence and the

U. S. Constitution applying to such evidence? Is there not a contradictory phrase herein used to propagate evidence which is neither substantial nor legal? The *no rules of evidence* permitted the admissibility of the X-ray which was unidentified, was loosely thrown into an evidence locker, not logged, not sealed, nor was there any way of knowing whose X-ray it was, where it was made, and when it was made. The X-ray was admitted into evidence because of no rule of evidence applicable to this type of hearing to determine the revocation or suspension of a license of a professional person and is hereby challenged as conjectural, speculative, incompetent. As to its constitutionality under the 6th amendment of the U. S. Constitution, the rules of evidence would have demanded proof of continuity of possession, proof of no alteration, proof of no tampering, but crucially important as well, no testimony was offered by the prosecution to show the authentication and interpretation of the X-ray.

Everything and anything from hearsay gossip and rumors can be poured into a hearing to deprive a man of his professional life or partial destruction thereof. The Bill of Rights does say that certain things shall not be done. And so the question here is not what the government must give, but rather what it may not take away especially in the light of this flaky and flimsy case against the petitioner.

The fact that a Board is selected to hear the case and the accused at the hearing has no right to select the members of the Board nor its chairman demonstrates implied bias if not actual bias from the outset of the proceedings. He is denied a Jury trial, given a stacked deck, and in the case at bar was not tried by his peers in that one of the Voting Hearing members was a PHD, not a chiropractor. The actual bias occurred in this case when the Hearing Board unanimously affirmed its own prior decision that the

single X-ray was a proper identification of the investigator's dental work and body without another X-ray to compare. This was a demonstration of bias against the accused. Further in the case at bar the Hearing Board did permit the investigator on an alleged re-direct examination to read freely from his alleged memorandum with no past recollection of the event, destroyed further cross examination and the right to an impartial hearing.

The equal protection clause of the Constitution under the 14th Amendment and the privileges and immunities clause is guaranteed to all citizens of the several States under our constitutional Government and the defense therein is the essential meaning of our Constitution, Bill of Rights and Civil Rights.

Constitutional rights should not be abrogated by a default in admininstrative hearings.

Respectfully submitted,

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